APPEALS BOARD
UTAH LABOR COMMISSION

RANDY WOLFE-VELARDE, **Petitioner,** **vs.** **ALCOA and INDEMNITY INSURANCE CO. OF NORTH AMERICA,** **Respondents.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 04-1135**

Alcoa and its insurance carrier, Indemnity Insurance Co. of North America, (referred to jointly as "Alcoa") ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's award of benefits to Randy Wolfe-Velarde under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Wolfe-Velarde claims workers' compensation benefits from Alcoa for a work accident that occurred on August 23, 2004, causing injury to his low back. Judge George held an evidentiary hearing but retired prior to rendering a decision on the case. Following his assignment to the case, Judge La Jeunesse reviewed the record and found that, even if Mr. Wolf-Velarde had a preexisting condition that necessitated application of the more stringent test for legal causation, Mr. Wolfe-Velarde's work activity satisfied the test. Judge La Jeunesse awarded benefits.

In its motion for review, Alcoa argues that Mr. Wolfe-Velarde had a preexisting back condition that required application of the more stringent test for legal causation, which he did not meet. Alcoa further disputes Judge La Jeunesse's assumption that, even if there were a contributing preexisting condition, this condition was caused by another work injury with Alcoa in 2002. Finally, Alcoa argues the decision did not consider evidence regarding Mr. Wolfe-Velarde's credibility.

FINDINGS OF FACT

The Appeals Board adopts Judge La Jeunesse's findings of fact as supplemented by the record. The facts relevant to the motion for review are as follows:

The medical records show that Mr. Wolfe-Velarde complained of lower back pain in 1982, 1995, and 1997. In 2002, he also complained of back pain following an accident working for Alcoa and was assessed with an "acute lumbar sprain/thoracic sprain." At the time, Alcoa denied benefits. He never filed an application for benefits for that injury.

At the hearing, Mr. Wolfe-Velarde testified that on August 23, 2004, an hour after he reported to work, he maneuvered several logs, each weighing 1800 pounds, into a row using a seven-foot pry bar and then proceeded to carry several spacers, each weighing between 65 and 90 pounds, over his shoulder. Following completion of those tasks, he had picked up a bag when he felt severe pain in his low back and left buttock. Alcoa disputes Mr. Wolfe-Velarde's credibility on the work activities he participated in leading up to his back injury. Alcoa also contends that the spacers Mr. Wolfe-Velarde claims to have carried would have weighed less than 50 pounds.

Dr. Garpa reviewed the results of an MRI and assessed "an L5-S1 annular tear with degenerative disc disease, herniation with cephalad migration to a free fragment behind the posterior and longitudinal ligament." In his surgical consultation, Dr. Gardner restated Dr. Garpa's assessment of the MRI results. Dr. Gardner later performed surgery at the left L5-S1 to remove the herniated disc in August 2004, and another surgery in February 2005.

Alcoa's medical consultant, Dr. Anderson, examined Mr. Wolfe-Velarde and the medical records. In response to Alcoa's question as to whether Mr. Wolfe-Velarde had a preexisting condition that contributed to the injury at L5-S1, and if so, to please identify the preexisting contributing condition, Dr. Anderson stated:

> This gentleman probably did have a pre-existing condition at L5-S1 as the original MRI described the disc as desiccated. Additionally, as early as 4/28/97, he self reported chronic low back pain. Additionally, he saw chiropractors on multiple occasions in 2002, however, whether this ever involved the low back is not discernable.

Dr. Anderson concluded there is a medically demonstrable causal connection between the activities performed by Mr. Wolfe-Velarde at work on 8/23/2004 and his disc injury at L5-S1.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A -2-401 of the Utah Workers' Compensation Act provides benefits to employees injured by accident "arising out of and in the course of" employment. The Utah Supreme Court has held that an injury "arises out of" employment when the work-related event or exertion is both the "legal cause" and the "medical cause" of the injury. See Allen v. Industrial Commission, 729 P.2d 15, 26 (Utah 1986). The Allen decision also established alternate tests for legal causation, depending on whether the injured worker suffered from a preexisting condition that contributed to his work injury. These alternate tests were further described by the Utah Supreme Court in Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986), as follows:

> Under Allen, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." (Citations omitted.)

However, not every pre-existing condition will trigger application of the more stringent "unusual or extraordinary exertion" test for legal causation. As the Utah Court of Appeals stated in Nyrehn v. Industrial Commission, 800 P. 2d 300, 334 (Utah App. 1990):

> [The Commission] may not simply presume that the finding of a preexisting condition warrants application of the Allen test. **An employer must prove medically** that the claimant "suffers from a preexisting condition which **contributes** to the injury." (Citations omitted; emphasis added.)

Here, Alcoa contends that the more stringent Allen test applies because Mr. Wolfe-Velarde had a preexisting back condition that contributed to his current condition. Although there is some indication in the medical opinions that Mr. Wolfe-Velarde had degenerative disc disease at the L5-S1 level, there is no medical opinion that states this degenerative disc disease contributed to the August 25, 2004, back injury. Dr. Anderson's opinion only reflected on the probability that Mr. Wolfe-Velarde had a pre-existing condition at the L5-S1 level but still concluded that it was Mr. Wolfe-Velarde's work activity of lifting the 18-pound bag that caused his back injury, without mention that the preexisting condition in any way contributed to his work injury.

The Appeals Board finds Alcoa failed to show that Mr. Wolfe-Velarde's preexisting back condition contributed to his work injury, and therefore the more stringent Allen test for legal causation was unnecessary. The Appeals Board notes that this finding makes consideration of Alcoa's other two arguments—that the preexisting back condition was not caused by the 2002 work accident and Mr. Wolfe-Velarde's credibility in his testimony regarding his strenuous activities—unnecessary. However, the Appeals Board agrees with Judge La Jeunesse's assessment of those issues. The Appeals Board concludes that Mr. Wolfe-Velarde's back injury was legally and medically caused by his work activities and he is thereby entitled to compensation.

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ORDER

The Appeals Board affirms Judge La Jeunesse's order of benefits. It is so ordered.

Dated this 16th day of December, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.